Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Schools and Libraries Universal Service Support Mechanism	)	CC Docket No. 02-6
	)	
	)	

COMMENTS OF THE NATIONAL EDUCATION ASSOCIATION, INTERNATIONAL SOCIETY FOR TECHNOLOGY IN EDUCATION AND THE CONSORTIUM FOR SCHOOL NETWORKING

The National Education Association (NEA), the International Society for Technology in Education (ISTE) and the Consortium for School Networking (COSN), through undersigned counsel, hereby submit these comments in response to the Notice of Proposed Rulemaking and Order (the Notice) in the above-captioned proceeding.[1]

INTRODUCTION

NEA is America's oldest and largest organization committed to advancing the cause of public education, with 2.6 million members working at every level of education, from pre-school to university graduate programs. ISTE, and COSN are membership-based groups that serve educators using technology to improve teaching and learning. ISTE, a nonprofit professional organization with a worldwide membership of leaders in educational technology, promotes appropriate uses of information technology to support and improve learning, teaching, and administration in K–12 education and teacher education. For nearly a decade, COSN, whose

[1] *Notice of Proposed Rulemaking and Order*, (FCC 02-8), released January 25, 2002 (hereinafter, "Notice").

members include national education associations, local school districts, state education agencies and individual leaders in education technology that are committed to integrating technology into the classroom, has been at the forefront of efforts to improve learning in K-12 classrooms via the Internet and telecommunications.

With memberships comprised of thousands of educators who derive benefits from the E-Rate program, NEA, ISTE, and COSN have been intimately involved with its establishment and implementation and remain strong advocates for its continued operation. The comments that we submit today represent only the most recent chapter in our efforts to both preserve the program and improve its administration. We share the Commission's desire, which is evident throughout the Notice, to improve the E-Rate program's operation, ensure that the benefits of the E-Rate program are distributed fairly and equitably, and improve oversight over the E-Rate program to prevent waste, fraud, and abuse.

For those reasons, we support a number of the rule changes proposed in the Notice. Given the increasing need to ensure safe and secure school environments, we are pleased with the Commission's proposed expansion of E-Rate supported eligible services to include voice mail and wireless services used by school bus drivers, non-teaching school staff, and security personnel. Additionally, we note with approval the Notice's proposals to maintain and codify the 30% rule, to require service providers to offer applicants a choice of reimbursement methods, to place reasonable limits on equipment transferability, and to modify the program's rules on filing appeals. Finally, NEA, ISTE, and COSN applaud the Commission's thoughtful proposal to extend the benefits of the E-Rate to unserved community members without increasing program costs.

Although NEA, ISTE, and COSN generally support the bulk of the proposed rule modifications contained in the Notice, we have serious reservations about any proposal that would, in our view, destabilize or compromise the integrity of the program. Thus, we actively oppose the Commission's proposal to permit eligible applicants to receive discounts for Internet access when bundled with content on the grounds that it would: 1) allow scarce program resources to be committed to currently ineligible products; 2) potentially decrease the availability of internal connections funding; and 3) establish a precedent that could lead to the program paying for other currently ineligible services, including hardware and professional development. Additionally, we urge the Commission not to adopt any rule that would require applicants to certify compliance with the Individuals with Disability Education Act (IDEA), the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 (ADA) in order to receive funding. While we strongly support the thrust of these laws, we believe that implementation of the proposed certification would exceed the Commission's authorization, would complicate the application process, would delay the efficient distribution of funds to eligible participants, and would impose a burden on the SLD to monitor and enforce compliance with these disabilities laws. We believe that school and library compliance issues related to those laws are best handled by the Departments of Education and Justice during the relevant reauthorization processes.

More than any other program change proposed in this Notice, NEA, ISTE, and COSN believe that it is imperative that the Commission use this rulemaking as a vehicle to reiterate its support for an already existing rule: that unused program funds from program funding years should be carried forward to and used in succeeding program years. For the past three program years, individual applications for funding have exceeded 35,000, overall funding requests have been nearly the double the annual cap, and internal connections funding has been unavailable to

any applicants with less than 82% eligible discount rates. With this incredible demand likely to continue to outpace available funding for many years to come, now more than ever is there a need to ensure that all funds – particularly unused funds from previous years – are marshaled and distributed promptly to deserving eligible applicants. We urge the Commission to adhere to and enforce this pre-existing rule.

DISCUSSION

I. APPLICATION PROCESS

A. Eligible Services

1. A Pre-Approved List of Eligible Services Would Increase the Efficiency and Fairness of the Application Process

In an effort to improve the E-Rate program's efficiency and fairness, the Notice proposes to require that E-Rate applicants only apply for services from a pre-approved eligible services list. Under the current regulations, the program's Administrator, the Schools and Libraries Division (SLD) of the Universal Service Administration Company (USAC), evaluates on an on-going basis particular services offered by service providers and determines their eligibility for discounts. NEA, ISTE, and COSN are generally supportive of the notion of allowing applicants to apply based on a pre-approved list but remain unclear how this proposal would be implemented.

There is little question that requiring applicants to choose from a pre-approved list of services could greatly improve the efficiency of application processing. It would greatly reduce incidences of applicants unwittingly seeking support for ineligible services, thereby imperiling their applications, and it would alleviate SLD's application processing burden. However, we are not certain how this pre-approved list would be structured. For example, the Notice does not

make clear if the pre-approved list will appear to applicants as a very specific listing of services that includes the names of various providers of those services. If that is the case, issues may arise regarding whether service descriptions contained in the list, placement of particular provider's services on the list and inclusion or exclusion from the list would lead applicants to prefer one provider's product or service over another.

Of even greater concern to the applicant community is the issue of SLD's ability to review, approve, and place on the list new services in a timely manner. Many in the applicant community have already observed that it takes SLD a significant period of time to evaluate and approve new services under the current ad hoc system. We fear that the institution of the proposed pre-approved list system could perpetuate this situation, thereby delaying the ability of applicants to purchase cutting-edge services for months and even years. Therefore, NEA, ISTE, and COSN recommend that, if the Commission requires applicants to choose from a pre-approved list, it afford SLD only ninety (90) days from receipt of a request by a company or an applicant to review and decide upon the eligibility of a new service. If the SLD is unable to complete the review process within 90 days or the request is received less than 90 days from the close of the application window, applicants should be permitted to include the request for support of a new service in their applications. Applicants who include such requests in their applications should receive a limited exemption from the 30% rule if SLD later determines that the new service is ineligible for support. In that event, NEA, ISTE, and COSN suggest that the new service request be severed from the application and the remainder of the application be processed normally.

Even if the pre-approved services list proposal is not adopted, we recommend that the current eligible services list be upgraded to provide applicants with more specific descriptions of

eligible services. Providing applicants with greater detail about each eligible service will generate less confusion, stem the flood of applicant questions to SLD's hot line, and lead to fewer application rejections, all of which lowers program costs and stimulates efficiency.

2. The Commission Should Modify the Selection of Eligible Products and Services to Include Wireless Services and Voice Mail

NEA, ISTE, and COSN urge the Commission to modify its list of eligible products and services to include both wireless services used by non-educational school personnel and voice mail.[2]

a) Wireless services

The Commission currently interprets the statutory provision requiring applicants to receive discounts only for "educational purposes" as barring discounts for use of wireless services by school-bus drivers, non-teaching school staff, and security personnel (non-educational personnel). Because the important work of non-educational personnel is conducive to developing and maintaining a positive educational environment, NEA, ISTE, and COSN support the Commission's recommendation to revisit the definition of "educational purposes" and allow non-educational school personnel to utilize E-Rate supported wireless technologies.

First, even though safety and security are not traditional "educational purposes," school violence incidents and the recent tragedies in New York and Washington militate in favor of making every effort to improve communication both within schools and between schools and personnel working outside of the building. According to the National Center for Education

[2] At this time, NEA, ISTE, and COSN are declining to comment on whether the Commission should modify the eligibility rules with respect to wide area networks (WANs). NEA, ISTE, and COSN have insufficient information to assess the affect of the current rules on the usage of Priority One funds.

Statistics (NCES)[3], safety and discipline are necessary for effective education. In order to learn effectively, students require a secure environment where they can concentrate on their studies. Additionally, school crime affects school resources, sometimes diverting funds from academic programs or decreasing schools' ability to attract and retain qualified teachers.[4] Thus, addressing school safety and security concerns improves the learning process and fosters student achievement.

Second, the Commission and SLD already implicitly acknowledge that safety and security are valid "educational purposes" by allowing security personnel to use E-Rate supported pagers. In addition to the fact that allowing security and other non-educational personnel to use wireless services would be consistent with E-Rate policy on pagers, many of the purposes for which paging services are utilized could be better addressed through the use of wireless services.

Third, while NEA, ISTE, and COSN are concerned with preventing waste, fraud, and abuse in the program, we believe that schools can easily mitigate such problems related to use of wireless technology be non-educational personnel in a number of ways: 1) limiting the use of phones by non-educational staff to the work hours; 2) providing staff with cell phones that lack long distance capability; and 3) spot-checking phone records to ensure that they are being used for work-related purposes.

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[3] The NCES is the primary federal entity for collecting, analyzing, and reporting data related to education in the United States. Not only does the NCES fulfill a Congressional mandate to collect, analyze and report statistics on the condition of education in the United States, the NCES also conducts surveys to address high priority education data needs.

[4] See NCES School Survey on Crime and Safety Home Page, http://nces.ed.gov/surveys/ssocs. *See also* Kaufman, P., Chen, X., Choy, S.P., Peter, K., Ruddy, S.A., Miller, A.K., Fleury, J.K., Chandler, K.A., Planty, M.G., and Rand, M.R. *Indicators of School Crime and Safety: 2001.* U.S. Departments of Education and Justice, NCES 2002–113/NCJ-190075, Washington, DC: 2001. Due to the rising concern for school safety, the United States Department of Education recently sponsored the NCES to conduct *The School Survey of Crime & Safety* ("SSOCS") to assess the affects of violence and crime on students and the educational system.

Fourth, NEA, ISTE, and COSN submit that adding the use of wireless technology by non-educational school personnel to the eligible services list is necessary in order to advance the program's goal of technological neutrality. The Commission itself noted this aim of the Act in 1999, stating: "Among the fundamental goals of the Telecommunications Act of 1996 is the promotion of innovation, investment, and competition among all participants and for all services in the telecommunications marketplace, including advanced services."[5] It is a logical inference that the limitations on using E-Rate to purchase wireless technologies has likely led applicants to favor wireline technologies over wireless technologies, particularly if wireless companies sell bundled Internet access/cell phone service packages. Broadening the rules accomplishes the goal of technological neutrality, and eliminates the incentive to prefer wireline technology to wireless technology.

b) Voice Mail

For reasons similar to those expressed above, NEA, ISTE, and COSN support extending E-Rate coverage to voice mail systems. We are convinced that voice mail serves a number of valuable educational purposes and that permitting voice mail to become a supported service improves application processing efficiencies.

Like the use of wireless technologies by non-educational school personnel, we believe that school and library usage of voice mail is an appropriate educational purpose and thus should be an eligible service. Numerous studies have indicated that parental involvement in a child's

[5] *In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Third Report and Order, FCC 99-355 (1999) (citing *In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24017 (1998)); Telecommunications Act of 1996 §§ 101 and 706, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 251 et seq.; *see also* Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996).

education is one of the leading indicators of that child's academic success. According to the NCES Survey *Fathers' and Mothers' Involvement in Their Children's Schools by Family Type and Resident Status*, a father's high involvement in his child's school increases the odds of that child obtaining mostly A's by 42% in a two biological parent family, 13% in a stepmother family, and 77% in father-only families.[6] Similarly, a mother's high involvement increases the odds by 20% in a two biological parent family, 45% in stepfather family, and 54% in a mother-only family.[7] Moreover, parental involvement in schools also decreases the likelihood that a child will ever repeat a grade, or be suspended or expelled.[8]

Voice mail increases parental involvement in schools by improving or, in some cases, establishing communications among schools, teachers, students, and parents. In recent years, many schools have explored the benefits of using voice mail systems to provide a variety of information to parents, including school work, homework, weather and safety reports, and immunization requirements. Additionally, voice mail has made it possible for parents to contact teachers to express concerns about their children, or to provide information to teachers to aid in their children's education. Voice mail also promotes safety and security in schools, both of which are critical to maintaining positive school environments. In emergencies, schools and libraries employ voice mail systems to circulate messages and instructions to staff and can be a method of communicating information to parents and teachers.

Another major benefit of including voice mail in the eligible services list would be to lessen the burden on applicants and application reviewers. The proposed redefinition of voice mail would eliminate the need for applicants or, if they fail to do so, application reviewers to

[6] Nord, Christine Winquist and West, Jerry. Fathers' and Mothers' Involvement in Their Children's Schools by Family Type and Resident Status, U.S. Department of Education and National Center for Education Statistics, NCES 2001-032, Washington, D.C.: 2001.
[7] *Id.* at 35-36.

carefully parse telecommunications services bills in order to separate out the portion attributable to voice mail. This would not only make the program more attractive to applicants, it would speed the application review process and reduce the number of applications rejected for ineligible services.

B. The Commission Should Not Implement Discounts for Internet Access When Bundled with Content

In the Notice, the Commission proposes to permit applicants to receive full discounts on Internet access packages that include content, even if that content is also available separately, if the package provides the most cost effective Internet access. Under the current rules, schools and libraries may receive discounts on access to the Internet, but not on separate charges for particular proprietary content or other information services. Although the proposal has the potential to streamline the application process, NEA, ISTE, and COSN oppose this proposed rule change because we believe that it is contrary to the Commission's stated goals, as set forth in the Notice, and would compromise the integrity of the E-Rate program. Specifically, we assert that this change, if adopted, would: 1) allow scarce program resources to be committed to currently ineligible products; 2) potentially decrease the availability of internal connections funding; and 3) establish a precedent that could lead to the program paying for other currently ineligible services, including hardware and professional development.

NEA, ISTE, and COSN are deeply troubled by the prospect of any rule change that diverts resources away from applications for the already oversubscribed group of eligible services – telecommunications services, Internet access, and internal connections. As we noted earlier, the E-Rate program now routinely faces a lack of funding each year for just these services and the vast majority of applications for internal connections are denied. In fact,

[8] *Id.*

USAC's recent Year 5 demand estimate shows that internal connections funding request totals from 90% eligible applicants are so high that it is unlikely that applicants below that figure will receive discounts. Additionally, the demand estimate suggests that applicants in lower discount bands, likely discouraged by repeated failures to obtain internal connections discounts, are now not even bothering to apply for internal connections discounts: only 25% of all applications for internal connections in Year 5 are from applicants eligible for less than 80% discount rates. This rule change will only exacerbate the funding problem. Allowing content when bundled with Internet access to receive the benefit of E-Rate support is likely to increase the demand for Priority 1 funding and concomitantly decrease the availability of Priority 2 internal connections funding.

We also worry that this rule change would set a dangerous precedent by allowing program funds to be diverted to other worthwhile but clearly ineligible services. If this change were to be implemented, we can easily foresee other parties attempting to exploit it to argue in favor of using the E-Rate to provide funding for other services. Our concerns about precedent here are by no means theoretical: just last year, some Congressional members and the Administration proposed to tap the E-Rate for professional development and software purchases. Although well intentioned, those proposals to expand the program would only serve to undermine the core connectivity mission of the E-Rate.

Finally, while this new bundling policy would certainly ease the administrative burden of applicants and application reviewers, we fear that the proposed rule only provides service providers with the incentive to insert as much branded, proprietary content as they can into Internet access packages and price those packages so that they are always the most cost-effective. This type of arrangement, where service providers are able to place their content

brands before students, teachers, librarians, and library patrons at the E-Rate's expense, amounts to providing content producers with a no-cost and very useful marketing tool. This arrangement is not what the authors of the E-Rate contemplated or would countenance.

C. The Commission Should Codify the "30% Rule" for Review of Requests Including Eligible and Non-Eligible Services

NEA, ISTE, and COSN support the current, uncodified rule that permits SLD to reject an entire application for E-Rate support if SLD determines that more than 30% of the services requested are ineligible. As the SLD has successfully demonstrated over the past five years, the current rule is relatively easy to apply administratively, requiring a simple cost analysis of all services requested. Even more importantly, SLD has consistently applied this rule over the course of the past three funding cycles and, as a result, the rule is well understood and adhered to by applicants. In fact, at this point, any change to the current 30% rule could cause substantial harm to the program by sewing confusion among program applicants and application reviewers.

In any event, the Commission's proposal to streamline the application process by limiting applicants to a selection of pre-approved eligible services may render the 30% rule irrelevant. *See supra,* Section I.A.1. Because applicants could only submit funding requests for pre-approved services (or, as NEA, ISTE, and COSN propose, for new services that would be exempt from the 30% rule), there would be fewer instances where applicants would seek support for ineligible services. NEA, ISTE, and COSN are similarly confident that our proposal to improve the eligible services list by incorporating more detailed and specific information on various services would also help limit requests for ineligible services.

D. The Commission Should Not Mandate that Applicants Certify Compliance with the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and the Rehabilitation Act of 1973

As an initial matter, NEA, ISTE, and COSN declare that they support the aims of the Americans with Disabilities Act of 1990 (ADA), the Individuals with Disabilities Education Act (IDEA), and the Rehabilitation Act of 1973. Both of our organizations believe that it is important to ensure that all members of the disability community are able to gain access to the Internet's vast resources and that all barriers to such access must be addressed meaningfully and expeditiously. Indeed, we encourage the Commission and the SLD to use the E-Rate program as a means to educate the public about disability law and the importance of ensuring access for the disabled to technology and the Internet.

We know that it is only with the best of intentions that the Commission proposes in the Notice that all applicants certify that all services used in conjunction with the E-Rate program are in compliance with these statutes. However, for a number of reasons, we do not believe that the E-Rate program is legally and practically the most appropriate vehicle to enforce compliance with these critical statutes. Instead, we assert that this year's reauthorization of two of the very laws at issue here – IDEA and the Rehabilitation Act of 1973 – offer far better opportunities to address the enforcement of and compliance with disability law in schools and libraries.

First, NEA, ISTE, and COSN submit that the Commission does not have the power to require compliance with these particular laws. Specifically, Article I, § 1, of the Constitution vests "[a]ll legislative Powers herein granted ... in a Congress of the United States." Thus, Congress is the only entity capable of authorizing a federal agency to enforce legislation. *Loving v. United States,* 517 U.S. 748, 771, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996) (holding that the

Constitution permits no delegation of those legislative powers). In order for Congress to confer any degree of decision-making or enforcement authority upon an agency, Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928). Congress has not authorized, in any of the aforementioned disabilities laws or in the Commission's main authorizing statutes, the Commission to generally enforce the ADA, IDEA or the Rehabilitation Act of 1973. To date, Congress has only vested the Commission with limited authority, through explicit statutory language, to regulate in the disability arena (e.g. administering Section 255, closed captioning, and voice description on television provisions of the Telecommunications Act of 1996). Consequently, implementing the rule proposed in this Notice would be tantamount to an executive branch agency usurping powers reserved to the legislative branch.

Second, even if the Commission could assume responsibility for enforcing compliance, it is unclear exactly how it would construe these laws in relation to the E-Rate program. For example, the ADA prohibits discrimination against individuals with disabilities in employment practices by employers with more than 15 employees, in the administration and provision of services, programs, and activities by a public entity, and in the full and equal enjoyment of goods, facilities, privileges, advantages, and accommodations for all public accommodations (including all schools and libraries). Similarly, the Rehabilitation Act of 1973 prohibits discrimination against individuals with disabilities in the use of federal funds and the administration of federal programs, and IDEA imposes additional requirements on states

accepting federal funds to provide educational services to children with disabilities.[9] Before even considering enforcing compliance with these laws, the Commission would have to determine the scope of "compliance" in this context, or which aspects of the laws would be applicable to the E-Rate program. Additionally, the Commission would need to determine whether the same definitions would apply to the very different entities eligible to participate in the program – public schools, private schools and public libraries – since each of these entities are subject to different requirements under the disability laws. Before long, the Commission could find itself in the position of drafting disability compliance rules for all public and private schools and public libraries, something that is outside its field of expertise.

Third, even if the Commission determined which aspects of the disability laws to apply to the E-Rate program, the proposed certification language offered in the Notice is extremely vague, leaving what constitutes compliance with those laws open to a wide range of interpretations. While the authors of this language may have intended that applicants ensure compliance with these disability statutes only in relation to the connectivity services paid for by E-Rate, the language could also be construed to require that applicants ensure compliance with anything used in conjunction with these services, including hardware and software. And if the latter is the case, compliance could involve E-Rate applicants expending significant sums to purchase new accessible technology or to upgrade existing computers and software, thereby making program participation more expensive and less attractive.

Fourth, this proposed rule change would ultimately foist enforcement of these laws on the SLD, an entity that lacks the expertise and the resources to police applicant compliance with disability law. The SLD is already responsible for auditing the truthfulness of more than 15

[9] Under IDEA, the regulations are imposed on the states that accept funds to provide services to children with disabilities through their public schools. While the schools bear responsibility for complying with IDEA, the

different certifications that all applicants must sign. These certifications range from attestations that applicants have reserved sufficient funds to pay for the non-discounted portions of eligible service costs to attestations that the applicant has developed and implemented Internet safety policies. For the most part, currently existing certifications are easy for SLD to audit: to determine the truth of sufficient funds and Internet safety policy certifications, it is a simple matter for SLD to request budget documents or a copy of the policy. Determining the truthfulness of an applicant's certification as to compliance with disability laws, though, is significantly more difficult than auditing for budget documents and policies; it entails careful review of school and library facilities and technology to determine whether disabled students, teachers, librarians and library patrons can access E-Rate-related services. A review of the certifications would also require significant information from the applicant to determine which of the statutes are applicable, and to what extent. Because of the complexity of the laws and the diversity among applicants, this audit would add significant time to the review process. Furthermore, SLD's current staff has no special expertise in enforcing complicated disability laws and would likely need to be retrained or supplemented with auditors possessing disability experience. Finally, the certifications would also add expense and difficulty to the beneficiary audits, which monitor applicants' compliance with program rules. Consequently, the addition of this proposed certification would lead to even more administrative outlay from an already cash-strapped program.

POST COMMITMENT PROGRAM ADMINISTRATION

E. Service Providers Should be Required to Offer Applicants a Choice of Payment Method

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schools are ultimately dependent on states to establish policies and procedures for using the IDEA program funds.

NEA, ISTE, and COSN support the Notice's proposals to require service providers to offer applicants a choice of payment options and to mandate formally that service providers must remit reimbursements to applicants within 20 days. Under the program's current rules, service providers are not obligated to offer applicants a choice of payment methods. Generally, the service providers and the applicants negotiate whether the applicant will either (1) pay the service provider the full cost of services, and subsequently receive reimbursement from the provider for the discounted portion after the provider receives reimbursement through the Billed Entity Applicant Reimbursement (BEAR) process, or (2) pay only the non-discounted portion of the cost of services, with the service provider seeking reimbursement from the Administrator for the discounted portion. Many service providers insist that applicants to whom they provide services use the BEAR method of paying the up-front costs, because the financial expense associated with waiting for a federal reimbursement is shifted to the schools. This process, however, is disproportionately burdensome on schools and libraries that have budget constraints, and may deter applicants that cannot obtain the required cash up-front to receive their needed services from applying or utilizing the allocated funds. On balance, we contend that the need for applicants to have payment options vastly outweighs the service providers concerns for the delay in receiving the reimbursements from the federal government.

Additionally, there exists only an informal rule that requires service providers to remit BEAR reimbursements to applicants within 10 days. Moreover, service providers are not penalized for late remittances to applicants. NEA, ISTE, and COSN are aware of numerous instances where the failure of service providers to timely remit reimbursements to schools has caused significant budget problems. We wholeheartedly support the implementation of any proposal that will compel service providers to expeditiously carry out their responsibilities in the

BEAR process, including leveling sanctions against those who fail to timely remit BEAR reimbursements. For those reasons, we support codifying a rule that sets a time limit on BEAR remittances and establishes reasonable sanctions for providers who fail to meet remittance deadlines.

F. Equipment Transferability Should be Limited

NEA, ISTE, and COSN are acutely aware of the need to protect the integrity of this program and to ensure that the lowest-income applicants receive prioritized support for E-Rate discounts. Therefore, we are concerned with a practice brought to light in this Notice that impugns the program's integrity and shortchanges some of this nation's poorest schools. According to the Notice, school districts have transferred E-Rate supported internal connections equipment from very low-income schools to wealthier schools that would be otherwise ineligible for discounts. While we understand that, on occasion, districts may need to move equipment for valid reasons, it appears that some districts are using their poorest schools as "strawmen" applicants while the ultimate, intended beneficiaries of these services are schools with low discount rates that would be ineligible to receive E-Rate support for internal connections. NEA, ISTE, and COSN believe that such a practice, even if not widespread, represents a black eye for the program and must be eradicated.

The Notice proposes two alternatives to prevent this type of abuse of the E-Rate program: 1) limit applicants from transferring equipment for three years from the date of delivery and installation of equipment for internal connections, and for ten years in the case of cabling; or 2) deny internal connection discounts to any entity that has already received discounts on internal

connections within a specified period of years regardless of the intended use of the new internal connection. NEA, ISTE, and COSN support the first proposal, with some modifications.

This first option would impose reasonable time limits for transferring E-Rate supported internal connections services amongst school facilities. Additionally, it would preserve the right of districts to make decisions about the use of and location of equipment in the schools under their jurisdiction after the passage of the requisite period of years. Finally, the first option provides applicants and the SLD with a simple bright-line rule to follow, thereby avoiding confusion or the accumulation of additional administrative expense.

In our view, the second option seems completely unrelated to the equipment transferability problem and is geared only towards addressing the issue of limited funding for internal connections. In fact, it bears a striking resemblance to a proposal, floated last year in the Further Notice of Proposed Rulemaking and Order (FCC 01-143), released April 30, 2001, that would have barred applicants from receiving internal connections discounts two years in a row. The Commission contended then that this proposal would permit more deserving applicants to receive internal connections discounts. Our response to this slightly altered proposal differs little from the response we submitted to the original proposal last year: this proposal would not significantly impact the availability of internal connections funding because it would provide an incentive for large 90% districts to apply for gigantic amounts of funding in those years that they are eligible to apply. The end result would be that applicants occupying the lower discount bands, despite their high need, would be fated to never see internal connections funding.

As we noted initially, NEA, ISTE, and COSN support the first option but request that the Commission modify it to allow waivers for good cause. We expect that districts will encounter situations in which it will be necessary to transfer E-Rate supported equipment and cabling

before the end of the transfer ban. For instance, schools with E-Rate equipment may undergo significant construction necessitating the removal of students to other facilities or may terminate a lease agreement on a particular school. In those or similar events, we believe a waiver of the transfer ban would be warranted.

Finally, if the Commission should adopt the first option, NEA, ISTE, and COSN request additional clarification on what constitutes cabling, whether the 10-year ban on cabling precludes upgrades or additions to cabling, and why the cabling transfer ban is of such a long duration. The Notice does not define precisely whether only the cables themselves would fall within the transfer ban, or whether the routers and switches connecting the cabling would also be included within that category. Additionally, the Notice is silent on the issue of expansion. NEA, ISTE, and COSN foresee situations in which schools and libraries might need to install cable in new segments or additions of buildings, without removing or replacing existing cabling, before the passage of 10 years due to an influx of students or residents. Nor does the Notice provide any explanation of why the transfer ban for equipment is three years and the transfer ban for cabling is more than three times as long. On its face, the cabling transfer ban appears to us be an excessively long period of time to prevent districts from controlling their cable resources.

G. Schools and Libraries Should be Permitted to Share Excess Services with the Community

When Congress created the E-Rate program, it hoped and expected that this massive federal investment in connecting schools and libraries nationwide would spur communities to devote their own resources to bringing all residents online. According to a recent study by the Department of Commerce, entitled *A Nation Online*, more Americans than ever before are

signing on to the Internet, exchanging e-mails, and engaging in distance learning.[10] However, there remain a number of areas in the United States, largely poor urban and isolated rural communities, where residents are unable to gain entry into the digital world because of high costs or limited service options. According to *A Nation Online*, 75% of the people in households where the income is less than $15,000 per year and 66.6% of those in households with incomes between $15,000 and $35,000 are not connected to the Internet.[11] Additionally, 68.4 percent of all Hispanics and 60.2 percent of African-Americans have no home Internet access.[12]

In the face of these facts, the Commission issued a decision last year that allowed Alaska residents that lacked local or no toll access to the Internet to utilize Internet access services purchased by local schools and libraries with the aid of E-Rate discounts. While the decision was narrowly drawn and the Commission imposed a number of conditions on resident usage of E-Rate services, it represented the Commission's first step towards leveraging E-Rate resources for the use of other community members. This Notice's proposal to expand the concepts behind the Alaska decision to benefit other states and communities is clearly the next step to address this issue. After carefully considering all of the implications of expanding the usage of E-Rate supported services to community residents, NEA, ISTE, and COSN have concluded that allowing the Alaska decision to be applied nationwide is in keeping with the program's goals. Therefore, we support the Commission adopting a rule that would permit community members to use E-Rate supported services but propose below a number of conditions on such usage.

On December 3, 2001, the Commission granted the State of Alaska a limited waiver of section 54.504(b)(2)(ii), which requires that applicants certify that the services obtained from the

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[10] *A Nation Online: How Americans are Expanding Their Use of the Internet*, US Department of Commerce, Economics and Statistics Administration, and National Telecommunications and Information Administration (February 2002).

[11] *Id.* at 73-74.

schools and libraries mechanism would be used solely for educational purposes, to allow community residents to use E-Rate supported services.[13] In its original waiver petition, the State of Alaska indicated that many schools and libraries in the state had been forced to purchase services from the satellite providers on a flat-rate basis, which covered even the hours that the schools and libraries were not in use. Consequently, the schools and libraries were purchasing dedicated bandwidth that sat unused in off-business hours, including nights and weekends. Since so many communities in Alaska were located in areas where community access to the Internet was nonexistent, the state sought permission from the Commission to allow Alaskan schools and libraries to turn over the unused portion of the services to the community during the hours when the schools and libraries were closed. The Commission approved the request subject to five conditions: 1) that Alaska would only share these services in communities where there is NO local or toll-free Internet access available; 2) the school or library would not request more services than necessary for educational purposes; 3) community access would only be allowed where schools and libraries are paying flat fees for services, thereby ensuring no additional costs to the program; 4) any use of E-rate supported services by residents would be limited to the time that the school or library is closed; and 5) the excess services would be made available to all capable service providers in a neutral manner without regard to commitments or promises from the service providers.

NEA, ISTE, and COSN concur with most of the criteria the Commission implemented in the Alaska order and believe that they should be applied nationwide if the Commission decides to adopt this proposal. As we have noted time and again throughout our comments, NEA, ISTE,

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[12] *Id.*

[13] *Federal-State Joint Board on Universal Service, Petition of the State of Alaska for Waiver for the Utilization of Schools and Libraries Internet Point-of-Presence in Rural Remote Alaska Villages Where No Local Access Exists and Request for Declaratory Ruling*, CC Docket No. 96-45, Order, FCC 01-350 (rel. Dec. 3, 2001) (Alaska Order).

and COSN would not and could not sanction any proposal that increases this program's cost burden and decreases the availability of internal connections funds. Thus, we understand the Commission's need to impose a requirement in the Alaska order that allow community members to access E-Rate supported services only if that access does not lead to increased costs to the program. The same reasoning holds true for the requirement that bars schools and libraries from seeking additional E-Rate discounts to fund community members' usage of services. Additionally, we cannot support any proposal that undermines the central aim of the E-Rate program – providing service to K-12 schools and public libraries. Therefore, we support the Alaska order's requirement that limits use of E-Rate supported services to non-business hours. Such a requirement prevents community members use of E-Rate supported services from clogging networks with excessive traffic during school and library hours of operation, thereby ensuring that the E-Rate's main constituents – students, teachers, librarians and library patrons – do not suffer slow service or service shut-downs. All three of these criteria would be critical components in a nationwide plan to allow community members access to E-Rate supported services.

However, we believe that the first condition, which limits the Alaska decision to only those communities without local or toll free access to the Internet, should not be incorporated as a condition if the Alaska order is expanded. The lack of local access or toll free access to the Internet is not the only obstacle that consumers must overcome to gain access to the Internet. Prohibitively expensive service is just as forbidding to low-income consumers as no service at all. Indeed, *A Nation Online* indicates that 25% of all respondents cited cost as the primary reason for their lack of an Internet connection, with as many as 34.7% of household with

incomes below $15,000 citing cost as a factor.[14] NEA, ISTE, and COSN believe that there are many communities that face high Internet service prices because of limited competition, especially in low-income urban areas, that would be excluded if this Alaska standard were adopted. Consequently, NEA, ISTE, and COSN urge the Commission to disregard the no local or toll free Internet access standard and allow residents of all communities the opportunity to tap into E-Rate supported services during non-business hours.

NEA, ISTE, and COSN also request that the Commission consider allowing school districts the option of allowing community residents to use E-Rate supported services at school district facilities. This usage would have to meet the same conditions as remote access usage would and could not interfere with student usage of those facilities. The decision to allow such usage would be left entirely to the discretion of school district officials and any additional staffing, training or electrical costs would be borne by the school districts.

APPEALS

As a preliminary matter, we applaud the Commission for its efforts thus far in reducing the backlog of appeals by nearly 50% since June 2000. In June 2000, the Commission had approximately 260 appeals pending, but by January 2002, only 166 appeals remained pending. This dramatic decrease reflects the Commission's commitment to streamlining the appellate process and increasing the efficiency of the E-Rate program. We encourage the Commission to continue its efforts in expediting the appellate process.

[14] *A Nation Online,* at 75.

H. The Time Limit for Filing Appeals Should be Increased to Sixty Days

NEA, ISTE, and COSN fully support the proposal to increase the time limit for filing an appeal with the SLD and the time limit for filing an appeal with the Commission from the current 30 days to 60 days, and to determine the filing date based on the postmarked date rather than the date they are received by either the Commission or the SLD.

I. All Successful Appeals Should be Fully Funded

NEA, ISTE, and COSN believe that fairness dictates that the Commission ensure that all successful appeals receive full funding, even if funds from succeeding funding years must be utilized. In the Notice, the Commission seeks comment on the appropriate rules and procedures to govern the funding of successful appeals when insufficient funds have been reserved by SLD to fund all successful appeals. In its Eleventh Reconsideration Order and Further Notice, the Commission proposed to address the issue of insufficient reservation of funds for appeals by establishing funding priorities, under which all Priority 1 appeals would be funded first and Priority 2 appeals funded thereafter.

We believe that the Eleventh Reconsideration's Order's remedy is inadequate because it would have the effect of penalizing successful appellants by denying them full funding for requested services. Therefore, to ensure the integrity of the program, we propose that all successful appellants receive the full amount of E-Rate support to which they are entitled. If the funds reserved for appeals by SLD are insufficient to accomplish this goal, we recommend further that SLD make successful appellants whole by utilizing either unused program funds from the program year of the appeal or, if unused funds are unavailable, using funds from the following program year.

While we understand that meeting the goal of fully funding all appeals could potentially diminish the availability of funds before particular funding years even begin, we believe that such an action is warranted. Many applicants end up in the appeals process through no fault of their own. Moreover, appeals normally progress through a two-tiered process, beginning at the SLD and ending at the Commission, which can take a long time to complete. It strikes us as unfair to provide appellants with a pro rata share of their eligible requests or no funding at all after navigating the lengthy appeals process and prevailing on appeal. Assuring that successful appellants receive all the funding that they deserve is the best course of action for the appellants as well as for the program as a whole.

ENFORCEMENT TOOLS

J. Entities That Intentionally Violate Program Rules Should be Required to Fund the Cost of Independent Audits

The COMMISSION proposes to authorize the Administrator to require independent audits of recipients and service providers, at the expense of those entities, where there is reason to believe that problems exist. NEA, ISTE, and COSN recognize the need to protect the integrity of the program from fraud and abuse, but recommend that only those applicants and entities found to have knowingly and intentionally violated program rules be required to fund the cost of independent audits. To require all applicants to do so would very likely deter small schools and libraries from applying for program support and would cause significant budgeting issues for those that do apply.

K. The Commission Should Adopt Rules to Bar Entities that Intentionally and Repeatedly Violate Program Rules From Program Participation

As carefully monitored and heavily audited as this program is, it is not immune from the efforts of some entities to take advantage of its rules. Unfortunately, the Commission's current rules do not provide it with sufficient power to enforce the program's rules, including the ability to bar from the program for periods of years violators of program rules. NEA, ISTE, and COSN believe fervently that the Commission should have this power and should utilize it where appropriate.

A starting point for enforcing penalties against rule violators is a clear, graduated system that establishes appropriate sanctions based on the seriousness of the offenses. Without fair and consistent punishments for rules violations, potential violators will not be deterred and public support for the program may wane. The Commission's rules do not yet have such a system in place. NEA, ISTE, and COSN propose such a system below.

Before we present the outline for this system, though, we must make clear that our organizations in no way wish to see schools, libraries, and service providers punished for violations that amount to mere mistakes or poor judgment. Therefore, under the system that we propose, entities whose mistakes only rise to the level of misfeasance will sustain less severe penalties, such as warnings or reductions in discount rates. [In our view, any reduction in discount rate should be proportional to the severity of the violation, and the amount of funding affected by the violation.] Entities who engage in willful, intentional, and/or repeated rule violations, though, should face much sterner sanctions, including being barred from the program and, in extreme cases, being banished from it. The sliding scale of violations – ranging from Class 1 (least severe) to Class 5 (most severe) – appears below:

- **Class 1:** A violation should be placed in Class 1 if it is deemed "an honest mistake" – a Class 1 violation should be a minor infraction of the rules by a first-

time offender with no evidence of any willful or intentional act of deception. The punishment for a Class 1 violation should be a warning.

- **Class 2:** A violation should be placed in Class 2 if it constitutes a significant infraction of the rules, or is a minor infraction committed by an offender with a prior warning. There should be no evidence of any willful or intentional act of deception, but sufficient evidence that the entity's action was the result of poor judgment or misfeasance. The punishment for a class 1 violation should be a 25% reduction in the discount rate for applicants. Some form of suspension for a service provider offender might be appropriate here.
- **Class 3:** A violation should be placed in Class 3 if it constitutes a severe infraction of the rules, or multiple minor infractions of the rules, or if there is some evidence or question indicating that the offender willfully or intentionally violated the rules. The punishment for applicants should be a reduction in the discount rate by 50% - 75%, as deemed appropriate by the Commission. If the entity has committed a prior violation, the penalty may be assessed for more than one year, in a manner proportional to the financial gravity of the violation. If the penalty is imposed for more than one year, the percentage of the reduction in the discount rate may be decreased each year at the discretion of the Commission. Again, some form of suspension for a service provider offender might be appropriate here.
- **Class 4:** A violation should be placed in Class 4 if it constitutes a severe infraction of the rules, or multiple minor infractions of the rules, if there is evidence that the offender committed the violations knowingly and intentionally.

The punishment should be a 1-year suspension from participation in the program. If the entity is an applicant and has previously committed an infraction of the rules, the Commission may impose a reduction in the discount rate of not more than 75% in the year following completion of the suspension, 50% in the second year following suspension, and 25% in the third year following suspension.

- **Class 5:** A violation should be placed in Class 5 if it constitutes a severe infraction of the rules, or multiple minor infractions of the rules, the offender has repeatedly violated the rules in the past, there is evidence that the offender committed the violations knowingly and intentionally, and it is believed that the offender will continue to violate the rules in the future. The punishment should be a permanent ban from participation in the program.

II. UNUSED FUNDS

A. Reduction of Unused Funds

NEA, ISTE, and COSN commend the Commission for their attempts to mitigate the percentage of allocated funds that are not disbursed. As stated in the Notice, each year, applicants fail to use all of the funds for which they have applied. As of June 30, 2001, $940 million in funds from the program's first 2 years was not disbursed by USAC because applicants failed to submit appropriate documentation. NEA, ISTE, and COSN support the proposal that a record should be developed on the reasons why applicants and providers may fail to fully use committed funds under the program to determine the best method of reducing the unused funds.

B. Unused Funds Should Be Carried Forward and Distributed in Excess of the Annual Spending Cap

NEA, ISTE, and COSN strongly oppose the Commission continuing its practice of crediting back unused program funds to contributors through reductions in the contribution factor rather than rolling over such funds to succeeding programs years for disbursal to applicants. NEA, ISTE, and COSN concur with Commissioner Copps' dissent to the Notice in which he asserts that the rules are sufficiently clear to permit unused funds being carried over from one funding year to the next. While we recognize that consumers may derive some limited benefit from reducing the contribution factor with unused funds, we believe that the Commission's interpretation of the program's rules contravenes the plain meaning and intent of those rules and that the continuing high demand for program support attests to the need for applicants to gain access to unused funds. Therefore, we request that the Commission cease its practice of utilizing unused funds to reduce the contribution factor of program contributors and immediately move to roll over unused program funds to Year 5 for distribution to applicants.

As we note above, we believe that a plain reading of the program's rules supports our interpretation that unused program funds should be transferred to the next program year and disbursed to applicants. Section 54.507(a) of the Commission's rules states, "The annual cap on federal universal service support for schools and libraries shall be $2.25 billion per funding year, and all funding authority for a given funding year that is unused in that funding year shall be carried forward into subsequent funding years for use in accordance with demand." Furthermore, the original Universal Service Report and Order, CC 96-45, FCC 97-157 (rel. May 8, 1997) ("Universal Service Order") contemplated that the demand for funding and the availability of funds each year of the program would fluctuate, but estimated that the annual cost of the program would average $2.25 billion. The Universal Service Order explicitly stated that if

demand in the initial years of the program was limited, the funds collected in excess of demand could be carried over and used in subsequent years. The language is clear in its intent to permit the funds to be spent in excess of the cap.

However, in the Twelfth Order on Reconsideration, the Commission amended the rule and determined that no more than $2.25 billion could be "collected or disbursed" in Funding Year 2. In light of this restriction, the Commission refused to carry-over unused Funding Year 1 funds to Funding Year 2; instead, it applied the unused funds to reduce the contribution factor for Funding Year 2. Even though the Commission did not expressly adopt language further limiting the disbursement of unused funds in Funding Year 3, the Commission continued to follow the same policy of reducing the contribution factor. As stated in the Notice, at the time that the Commission ordered that the Funding Year 2 cap could not be exceeded in the Twelfth Order on Reconsideration, the Commission did not anticipate that unused funds from Funding Year 1 would still be remaining during Funding Year 3.

The continuation of these policies is proving devastating to the program. By continuing to provide credits to contributing providers, the Commission is sanctioning an outcome in which USAC and SLD collect and distribute fewer funds to eligible schools and libraries, thereby thwarting the purpose of the E-Rate program. By crediting back unused funds to contributing providers and allowing large amounts of program funds to languish in bank accounts, the Commission is perpetuating a cycle that prevents eligible applicants from receiving internal connections funding ostensibly because the E-Rate program is undercapitalized.

Therefore, to ensure a fair and equitable distribution of program resources and uphold the plain meaning of the program's original rules, NEA, ISTE, and COSN request that the Commission revisit its interpretation of its rules and permit unused funds to be rolled-over to

succeeding program years – even if the addition of rolled-over funds causes the $2.25 billion cap to be exceeded. We request further that the program's rules be clarified to permit the Commission to carry forward the unused funds into the most current funding year to streamline the disbursement of unused funds. It makes sense administratively to allow unused funds from Year 1, for example, to be carried forward to Year 5 and disbursed rather than to require SLD to reopen Year 2 in order to attempt to disburse unused Year 1 funds.

CONCLUSION

NEA, ISTE, and COSN applaud the Commission for continuing to seek input from consumers to improve the efficiency and success of the E-Rate program. As set forth above, with the exception of the bundled Internet access funding and the disability laws certification requirement, NEA, ISTE, and COSN generally support the Commission's proposed amendments to improve the efficiency of the application process, determine the appropriate usage of the funds post-commitment, ease the appellate process, increase enforcement of the regulations, and clarify procedures for the allocation and distribution of unused funds, and believe that the proposals will advance the Commission's stated goals for the E-Rate program.

Dated: April 5, 2002

Respectfully submitted,

NATIONAL EDUCATION ASSOCIATION,
INTERNATIONAL SOCIETY FOR
TECHNOLOGY IN EDUCATION, and
CONSORTIUM FOR SCHOOL NETWORKING

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